

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

KENNETH CULBREATH,

Plaintiff,

v.

CIVIL ACTION NO. 1:07CV113
(Judge Keeley)

SPEARS, Food Service Administrator,
WILSON, Assistant Food Service
Administrator, MILLER, Safety Director,
and UNITED STATES OF AMERICA,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

On August 22, 2007, the pro se plaintiff, Kenneth Culbreath ("Culbreath"), filed this civil action. Thereafter, pursuant to Local Rule of Prisoner Litigation 83.01, et seq, and 28 U.S.C. §§1915(e) and 1915A, the Court referred the case to Magistrate Judge James E. Seibert, who, after preliminary review, on July 22, 2008, recommended that the Court dismiss the claims against defendants Harley Lappin, Joyce Francis, E. Mace, Co Hobrat, the United States Attorney, John Doe, Jane Doe, and all unknown parties, and further recommended that the Court require defendants Spears, Wilson and Miller ("the remaining defendants") to file an answer to the complaint.

On August 12, 2008, the Court adopted the Magistrate Judge's Report and Recommendation and directed the Clerk of Court to issue

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a sixty-day summons for the remaining defendants. On October 15, 2008, the remaining defendants filed motions to dismiss or, in the alternative, for summary judgment. On October 16, 2008, pursuant to Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975), the Court notified Culbreath that he had the right to file a response to the motion and that, if he failed to timely respond to the motion, the Court could dismiss his case. Nevertheless, Culbreath did not file a response.

On December 18, 2008, Magistrate Judge Seibert filed another Report and Recommendation ("R&R") that recommended the Court grant the defendants' motions. This recommendation was based on the fact that any claim filed pursuant to the Federal Tort Claims Act was barred as a matter of law because Culbreath's injury was clearly work-related, and his Bivens claim, if any, failed to state a claim because it is clear that the remaining defendants did not act with deliberate indifference.

The Magistrate Judge's R&R informed Culbreath that failure to object would result in the waiver of his appellate rights on this issue. On January 15, 2009, Culbreath filed a motion for an extension of time to file his objections. On October 16, 2009, the Court granted the motion and ordered Culbreath to file his objections by February 9, 2009. On February 3, 2009, Culbreath

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requested a second extension of time and the Court granted the motion and ordered him to file his objections by February 24, 2009.

Subsequently, the defendants filed a Notice (dkt. no. 58), informing the Court that Culbreath died on February 14, 2009 at Stonewall Jackson Memorial Hospital in Weston, West Virginia, and attaching a copy of Culbreath's death certificate.

On July 22, 2009, the Court directed the Clerk to send a copy of the docket sheet and the R&R to the petitioner's mother, Christine Franklin. See Dkt. No. 62. In that Order, the Court notified Ms. Franklin that, if she intended to object to the pending R&R, she should file a notice of her intent by July 31, 2009. The Court also warned her that her failure to do so would result in dismissal of the case. As of this date, Franklin has filed no notice and no objections.¹

Therefore, the Court **ADOPTS** Magistrate Judge Seibert's Report and Recommendation in its entirety, **GRANTS** the motion to dismiss (dkt. no. 39), **GRANTS** the motion to Dismiss or in the Alternative Motion for Summary Judgment (dkt. no. 40) and **ORDERS** the case **DISMISSED WITH PREJUDICE** and stricken from the Court's docket.

¹ Failure to object to the Report and Recommendation waives any appellate rights in this matter and relieves the Court of any obligation to conduct a de novo review of the issue presented. See Thomas v. Arn, 474 U.S. 140, 148-153 (1985); Wells v. Shriners Hosp., 109 F.3d 198, 199-200 (4th Cir. 1997).

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It is so ORDERED.

The Clerk is directed to mail a copy of this Order to the pro
se plaintiff, certified mail, return receipt requested.

Dated: August 5, 2009.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE